

**WHEN AND HOW TO REFRESH A WITNESS'S MEMORY
AND
WHEN AND HOW TO USE PAST RECOLLECTION RECORDED**

IF A WITNESS ONCE HAD PERSONAL KNOWLEDGE OF A FACT BUT CANNOT RECALL THAT FACT WHILE ON THE STAND, AN ATTORNEY CAN TRY TO REFRESH THE WITNESS'S MEMORY OF THAT FACT.

SCRIPT FOR REFRESHING MEMORY:

Lawyer: What color was the jacket the Defendant was wearing at the time of the accident?
Witness: I just can't remember. It's been too long.
Lawyer: Would it refresh your memory to review your witness statement that you made soon after the accident?
Witness: Probably.
Lawyer: I am going to hand you a copy of that statement. Please turn to Page 2 and read the highlighted part SILENTLY to yourself. Do NOT read it out loud. When you are done, please close the document and look up.
Lawyer: Did reading that section of your statement refresh your memory about the color of the Defendant's jacket?
Witness: Yes it did.
Lawyer: So I will ask you again, what color was the jacket the Defendant was wearing at the time of the accident?
Witness: It was green.

Steps in refreshing a witness's memory when she/he cannot recall a fact s/he once knew:

- The witness states that a certain writing could help refresh his/her memory;
- the document does **not** have to be written or adopted by the witness.
- The lawyer doing the exam hands the document to the witness;
- The lawyer asks the witness to **silently** read a section of the document;
- The lawyer asks the witness if the witness can now remember the fact ;
- The witness answers in the affirmative.

Important:

- The document used to refresh memory does not have to have been written by the witness. Any document can be used to help the witness to recall the fact.
- The document used to refresh memory does not have to be an exhibit nor does it have to be otherwise admissible as evidence at the trial.
- Refreshing memory can be done in both direct and cross-exam.

Be aware that Rule 612 applies when refreshing memory.

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying; or
- (2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options. An adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.

WHAT IF YOU CANNOT REFRESH THE WITNESS'S MEMORY? YOU MAY BE ABLE TO USE AN EXCEPTION TO THE HEARSAY RULE TO GET THE INFORMATION INTO EVIDENCE IN A DIFFERENT WAY.

Assume this result during the exam of the witness:

Lawyer: Did reading that section of your statement refresh your memory about the color of the Defendant's jacket?

Witness: No it didn't. Sorry. I just can't remember.***

****This triggers the availability of Rule 803(5). The lawyer must lay the proper foundation under that section to try to get the information into evidence.

Rule 803. Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness

(5) Recorded Recollection. A record that:

(a) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(b) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(c) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

SCRIPT FOR USING PAST RECOLLECTION RECORDED:

Lawyer: How soon after the accident did you write out your witness statement?

Witness: The next day when the police interviewed me.

Lawyer: Was your statement accurate as to what you observed of the accident the day before?

Witness: To the best of my knowledge it was.

Lawyer: Is that your signature at the end of the statement?

Witness: It is.

Lawyer: Your honor, I request that the witness be able to read to the jury lines 5-8 on Page 2 of his witness statement concerning the color of the Defendant's jacket.

OC: Objection! Hearsay.

Lawyer: Your honor, reviewing his statement did not refresh the witness's memory and I just laid a proper foundation under Rule 803 (5) for an exception to the Hearsay Rule to allow the witness to read from his statement as a Past Recollection Recorded.

Judge: Objection is overruled. The witness may read the 3 lines pertaining to the color of the Defendant's jacket.

Important: When using **past recollection recorded**, the section of the document containing the fact at issue is **read** into the record by the witness.

The document may only be admitted if the opposing counsel asks for it to be admitted. (Most often, such a motion is not granted.)